Insurance Subrogation in Personal Injury Torts

The recent decision of the Supreme Court of Ohio in *Smith v. Travelers Insurance Co.*[1] sustained the validity of subrogation provisions for medical payments in an automobile insurance policy. The result is a significant expansion of subrogation in the area of personal injury tort claims. Subrogation provisions similar to the one litigated in *Smith* have been upheld in a large majority of the other states that have considered the issue.[2] Because automobile insurance is carried by the average motorist, because other accident and health insurance is increasingly common, and because accidents involving personal injury often precipitate lawsuits or threatened lawsuits, the attorney is likely to have occasion to consider the effects of insurance subrogation.

This Note will offer aid to those who are faced with a personal injury subrogation issue by explaining some basic aspects of insurance subrogation that are often only alluded to in court opinions, and by discussing points of particular concern in cases involving subrogation to personal injury tort claims. These points of concern include the effect of subrogation on important rules of tort litigation, requirements for joinder of the insurer, and some general policy issues.

I. The Facts and Holding in *Smith v. Travelers Insurance Co.*

The facts and rationale presented by the court in the brief *Smith* opinion can be stated concisely. The insured, Mrs. Smith, brought suit against her automobile insurer, Travelers Insurance Company (Travelers), after Travelers refused to pay Mrs. Smith for medical expenses incurred as a result of an automobile accident in which the driver of the other vehicle was allegedly at fault. Mrs. Smith had entered into a settlement with the alleged tortfeasor and his insurer. As part of this settlement she signed a release. Travelers maintained that its rights of subrogation to the

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1. 50 Ohio St. 2d 43, 362 N.E.2d 264 (1977).

2. *See, e.g.*, Alabama Farm Bureau Mut. Cas. Ins. Co. v. Anderson, 48 Ala. App. 172, 263 So. 2d 149, *aff'd*, 263 So. 2d 155 (Ala. 1972); Shipley v. Northwestern Mut. Ins. Co., 244 Ark. 1159, 428 S.W.2d 268 (1968); Higgins v. Allied Am. Mut. Fire Ins. Co., 237 A.2d 471 (D.C. App. 1968); DeCespedes v. Prudence Mut. Cas. Co., 193 So. 2d 224 (Fla. Dist. Ct. App.), *aff'd*, 202 So. 2d 561 (Fla. 1967); Rinehart v. Farm Bureau Mut. Ins. Co., 96 Idaho 115, 524 P.2d 1343 (1974); Damhesel v. Hardware Dealers Mut. Fire Ins. Co., 60 Ill. App. 2d 279, 209 N.E.2d 876 (1965); State Farm Mut. Auto. Ins. Co. v. Roark, 517 S.W.2d 737 (Ky. 1974); Travelers Indem. Co. v. Vaccari, 245 N.W.2d 844 (Minn. 1976); Busch v. Home Ins. Co., 97 N.J. Super. 54, 234 A.2d 250 (1967); Jacobson v. State Farm Mut. Auto. Ins. Co., 83 N.M. 280, 491 P.2d 168 (1971); Davenport v. State Farm Mut. Auto. Ins. Co., 81 Nev. 361, 404 P.2d 10 (1965); Carver v. Mills, 22 N.C. App. 745, 207 S.E.2d 394 (1974); Aetna Cas. & Sur. Co. v. Associates Transports, Inc., 512 P.2d 137 (Okla. 1973); Geertz v. State Farm Fire & Cas. Co. 253 Or. 307, 451 P.2d 860 (1969); Bradford v. American Mut. Liab. Ins. Co., 213 Pa. Super. Ct. 8, 245 A.2d 478 (1968); Schuldt v. State Farm Mut. Auto. Ins. Co., 238 N.W.2d 270 (S.D. 1975); Wilson v. Tennessee Farmers Mut. Ins. Co., 219 Tenn. 560, 411 S.W.2d 699 (1966); Foundation Reserve Ins. Co. v. Cody, 458 S.W.2d 214 (Tex. Civ. App. 1970); State Farm Mut. Ins. Co. v. Sessions, 22 Utah 2d 183, 450 P.2d 458 (1969); Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch., 4 Wash. App. 49, 480 P.2d 226 (1971); Travelers Indem. Co. v. Rader, 152 W. Va. 699, 166 S.E.2d 157 (1969).

insured's claim against the alleged tortfeasor for medical payments had been prejudiced by Mrs. Smith. This settlement was contrary to both the policy's subrogation provision to do nothing to prejudice such rights and a separate subrogation agreement executed after the accident pursuant to the policy.

The Supreme Court of Ohio, using a "straightforward application of contract principles,"[3] held that the subrogation clause in the policy was a valid defense for the insurer. Quoting a Tennessee decision,[4] the court stated that "[g]enerally, parties may contract as they wish and we cannot see that it is against public policy for the parties to contract for subrogation of medical payments."[5] Because the insurer had obtained legally enforceable rights by subrogation, and because the exercise of these rights had been precluded by the terms of Mrs. Smith's settlement with the tortfeasor, the insurer had suffered prejudice that would excuse it from the necessity of paying under the policy. The court, again quoting the Tennessee decision, noted that, "To hold otherwise would permit an injured plaintiff to recover twice [once from the tortfeasor and once from the insurer] for the same medical expenses."[6]

II. BASIC ANALYSIS OF SUBROGATION

A. *Definition and Purposes of Subrogation*

Subrogation, as the term is used in this Note, is a legal doctrine by which the insurer is substituted to the rights of the insured for the purpose of claiming reimbursement from a third person for the loss indemnified by the insurance.[7] Subrogation in insurance law thus serves two purposes. It prevents the insured from receiving a double recovery by requiring the insured to choose between seeking recovery either from the tortfeasor, or from the insurer in exchange for the claim against the tortfeasor. Subrogation also serves to reimburse the insurer from the one who ought to pay for the loss, the tortfeasor.[8] This latter purpose is related to the fault-based general principle of tort law because it places the ultimate burden of the loss on a culpable party.

The subrogated insurer can pursue the tortfeasor for payment of the claim to which it is subrogated. Because the subrogee (the insurer),

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3. 50 Ohio St. 2d 43, 46, 362 N.E.2d 264, 266 (1977).

4. Wilson v. Tennessee Farmers Mut. Ins. Co., 219 Tenn. 560, 566, 411 S.W.2d 699, 702 (1966).

5. Smith v. Travelers Ins. Co., 50 Ohio St. 2d 43, 46, 362 N.E.2d 264, 266 (1977).

6. *Id.* at 46-47, 362 N.E.2d at 266.

7. E. PATTERSON, ESSENTIALS OF INSURANCE LAW 148-49 (2d ed. 1957); W. VANCE, HANDBOOK OF THE LAW OF INSURANCE 787 (3d ed. B. Anderson 1951).

8. Shipley v. Northwestern Mut. Ins. Co., 244 Ark., 1159, 428 S.W.2d 268 (1968); Lyon v. Hartford Accident and Indem. Co., 25 Utah 2d 311, 480 P.2d 739 (1971) (emphasizing the role subrogation plays in preventing double recoveries); G. COUCH, 16 COUCH CYCLOPEDIA OF INSURANCE LAW, 61:18 (2d ed. R. Anderson 1966) and cases cited therein.

however, must base its claim upon the right of recovery held by the subrogor (the insured), the tortfeasor can use a settlement and release agreement with the insured as a defense to a suit by the insurer if the tortfeasor entered into the settlement without knowledge of the insurer's payment upon which the subrogation claim is asserted. The insurer thus has its subrogation rights prejudiced because the settlement and release precludes a successful suit by the insurer.

When suit against the tortfeasor has been precluded, however, the insurer has a right to sue its insured for repayment of the insurance recovery if the settlement was not assented to by the insurer. The cause of action for such a suit against the insured can be based on several theories, including constructive trust, implied promise, and deceit.[9] When the policy has an express provision, as many do, that the insured shall do nothing after the loss to prejudice the subrogation rights of the insurer, it would seem that the cause of action could be for a direct breach of contract. Such a suit for reimbursement effectuates the purpose of preventing the double recovery by the insured that would result if he were permitted to keep both the insurance money and the settlement proceeds covering the same injury.

B. *The Need for a Contract and Other Basic Requirements*

1. *The General Necessities of a Contract of Indemnity and of Payment; Variations Introduced by the "No Prejudice" Clause*

Subrogation can be either legal or contractual in nature, and applies when the underlying contract is one of indemnity.[10] Because contracts for life insurance, for example, are viewed as being in the nature of an investment and not contracts of indemnity, subrogation does not apply to them.[11] An insurance contract qualifies as a contract of indemnity when "the amount paid under the contract depends on the amount spent by the insured for the proper care of his injuries."[12] Since most modern insurance policies covering personal injury, such as policies for medical payments, limit coverage to the cost actually incurred in receiving appro-

9. W. YOUNG, LAW OF INSURANCE 365-66 (1971). *See* 6A J. APPLEMAN & J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4096 (1972); R. KEETON, BASIC TEXT ON INSURANCE LAW 159-60 (1971); E. PATTERSON, *supra* note 7, at 149; W. VANCE, *supra* note 7, at 786-87, 794. Some courts have held, however, that "after denial of liability by an insurer, the insured may enter into a settlement with a third party without prejudicing [his] rights against the insurer." Bunge Corp. v. London and Overseas Ins. Co., 394 F.2d 496, 497, *cert. denied*, 393 U.S. 952 (1968).

10. *See* DeCespedes v. Prudence Mut. Cas. Co., 193 So. 2d 224, 226 (Fla. Dist. Ct. App. 1966), *aff'd*, 202 So. 2d 561 (Fla. 1967); G. COUCH, *supra* note 8, § 61.8 and cases cited therein; E. PATTERSON, *supra* note 7, at 148. For a discussion of the distinction between legal and contractual subrogation, see text accompanying notes 23-28 *infra*.

11. G. COUCH, *supra* note 10, § 61:8; E. PATTERSON, *supra* note 7, at 148; W. VANCE, *supra* note 7, at 797.

12. State Farm Mut. Ins. Co. v. Farmers Ins. Exch. v. Sessions, 22 Utah 2d 183, 450 P.2d 458, 459 (1969).

priate treatment (for example, they do not "guarantee" $500 in payment even when actual expenses are less), these contracts are typically contracts of indemnity.

Even if there is a clear provision for subrogation in a contract that is obviously one of indemnity, there can be no subrogation until payment for the loss is actually made by the insurer, at least when the insurer is a plaintiff seeking its subrogation rights.[13] The insurer (subrogee) as plaintiff thus does not have a cause of action for reimbursement from the insured and the insurer cannot sue the tortfeasor directly until it has actually disbursed funds in payment for the risk covered by the policy.

When the insured is the party at fault in an accident, however, so that the insurance payment represents liability expenses (that is, payment for injury to the other person or damage to the other's property), the insurer as plaintiff has no subrogation suit. Subrogation is only possible when there is a third party tortfeasor, since under subrogation theory the insurer bases his claim upon the right of recovery held by the subrogor (the insured). The insured has no right of recovery against himself or against the other party when he is the one at fault in an accident. Moreover, the liability payment by the insurer represents the very expense that it has contractually agreed to bear.

When the insurer is a defendant, however, in an action brought by the insured seeking recovery under the policy, it has an effective defense to the suit if the insured has prejudiced its subrogation rights against a third party tortfeasor although no payment has yet been made. Arguments by counsel for the insured that the defending insurer has waived the subrogation clause by not making any payments[14] misconstrue the applicable language in the typical subrogation provision that constitutes the basis of the defense for the insurer. Some courts properly have made it clear that when the subrogation provision is being used as a shield, it is the "no prejudice" clause that is the basis of the insurer's defense.[15] This clause usually follows the subrogation clause and states that "[t]he insured . . . shall do nothing after loss to prejudice such [subrogation] rights."[16] If the insured has prejudiced the rights of the insurer (for example, by engaging in a settlement with the tortfeasor that precludes a lawsuit by the insurer), the insurer is properly excused from payment[17] and

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13. *See* J. APPLEMAN, 11 INSURANCE LAW AND PRACTICE § 6509 (1944); G. COUCH, *supra* note 10, § 61:46; E. PATTERSON, *supra* note 7, at 148-49; W. VANCE, *supra* note 7, at 790.

14. *See* Bradford v. American Mut. Liab. Ins. Co., 213 Pa. Super. Ct. 8, 245 A.2d 478 (1968); Hart v. State Farm Mut. Auto. Ins. Co., 248 N.W.2d 881 (S.D. 1976). Both courts rejected this argument in cases in which subrogation was being used as a defense by the insurer.

15. *See, e.g.*, DeCespedes v. Prudence Mut. Cas. Co., 193 So. 2d 224, 226, (Fla. Dist. Ct. App. 1966), *aff'd*, 202 So. 2d 561 (1967).

16. Smith v. Travelers Ins. Co., 50 Ohio St. 2d 43, 43-44, 362 N.E 2d 264, 265 (1977) (quoting the "no prejudice" clause in Mrs. Smith's insurance policy with Travelers).

17. *E.g.*, cases cited in note 14 *supra*. *See also* Shipley v. Northwestern Mut. Ins. Co., 244 Ark. 1159, 1162, 428 S.W.2d 268, 270 (1968); Higgins v. Allied Am. Mut. Fire Ins. Co., 237 A.2d 471, 471

thus should not be liable to an insured who sues it for payment under a breach of contract theory.

Even with the absence of a no prejudice clause, it is doubtful that an insured can recover under the insurance policy after he promises subrogation rights to his insurer and then makes a settlement with the tortfeasor that precludes the exercise of these rights.[18] In the interests of good faith bargaining, the insured's promise of subrogation rights to the insurer ought to carry with it a promise not to prejudice these rights, although it is possible to draw a technical and somewhat attenuated distinction between promising subrogation and promising to limit a possible settlement with the tortfeasor so as not to preclude the insurer's claim.[19] The insurer, however, that makes payment and then has its subrogation rights prejudiced by the insured's settlement with the tortfeasor can seek repayment of the insurance recovery[20] and courts may thus see little reason, barring bad faith dealing by the insurer, in allowing the insured to receive the insurance recovery when he simply acts to prejudice subrogation rights before the insurer pays.

The cases that recognize the insured's prejudicial settlement with the tortfeasor as an effective defense to an action against the insurer for breach of contract rest upon a threshold finding that the subrogation provision in question is valid, at least to the extent that it prevents a double recovery by the insured. In jurisdictions that have denied subrogation for personal injury tort claims, such as medical payments,[21] the insurer cannot claim to have any rights prejudiced since no enforceable right exists. The traditional result under the collateral sources rule,[22] which allows the insured to recover from both his insurer and the tortfeasor, should apply since there is no legal basis to excuse the insurer from his obligation to pay, unless a policy provision unrelated to subrogation releases the insurer from that obligation.

2. *Legal and Contractual Subrogation Distinguished*

Although subrogation had its origin in equity,[23] today a distinction is

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(D.C. App. 1968), DeCespedes v. Prudence Mut. Cas. Co., 193 So. 2d 224, 225 (Fla. Dist. Ct. App., 1966), *aff'd*, 202 So. 2d 561 (Fla. 1967).

18. *See* Foundation Reserve Ins. Co. v. Cody, 458 S.W.2d 214, 216 (Tex. Civ. App. 1970). Although the contract at issue had a "no prejudice" clause in it, the court apparently did not base its opinion on the presence of this clause.

19. One might argue that by promising subrogation the insured merely agrees to let the insurer stand in his place for the subrogation claim provided the insurer acts on the claim before settlement between the insured and the tortfeasor is reached.

20. *See* note 9 and accompanying text *supra*.

21. Subrogation to medical expense claims has been declared invalid in Arizona and Missouri. State Farm Fire and Cas. Co. v. Knapp, 107 Ariz. 184, 484 P.2d 180 (1971); Travelers Indem. Co. v. Chumbley, 394 S.W.2d 418 (Mo. App. 1965).

22. *See* text accompanying notes 47-49 *infra*.

23. W. VANCE, *supra* note 7, at 787-88.

made between legal (equitable) and contractual (conventional) subrogation. Legal subrogation arises by operation of law and is rooted in the totality of the circumstances involved; under some circumstances justice is thought to be better served by substituting the one who has actually paid to the rights that another has against a third party. Contractual subrogation, however, is based on an express provision between the parties by which the subrogor agrees to let the subrogee stand in his place.[24] Insurance contracts are almost always written in detail and subrogation provisions expressly set forth; thus, contractual subrogation is common in modern insurance practice.

The assertion is sometimes made that there is little practical effect in distinguishing between legal and contractual subrogation because the same facts that entitle the insurer to claim subrogation under the contractual provisions would also create legal subrogation.[25] Yet in *Michigan Hospital Service v. Sharpe*[26] the Supreme Court of Michigan held that payments by Michigan Hospital Service (Blue Cross) to its injured subscriber merely constituted satisfaction of a contractual obligation that arose because of the occurrence of a risk that the Service had agreed to cover, and that absent an express provision in the policy there was no compelling reason to allow the additional right of legal subrogation.[27] The position taken in *Sharpe* is buttressed by insurance law authority which states that if there is a contract, the rights of the parties will be determined by that instrument and the equities will not be allowed to expand or defeat subrogation rights.[28]

Cases such as *Sharpe*, which would limit the underwriter's subrogation rights to those that are expressly in the written contract, state the better rule. Insurers draft the policies that they sell, and thus should be limited to the terms of their own contracts. An insurer that wants the protection of subrogation rights has abundant power to add appropriate provisions. There is little necessity for allowing the insurer, the party in the superior bargaining position, to gain an additional advantage by virtue of judicial interpretation.

3. *Varying Results Obtained Because of the Wording of the Subrogation Provision*

Provisions styled as subrogation provisions have not always been

24. G. COUCH, *supra* note 10, § 61:2; J. APPLEMAN, *supra* note 13, § 6503.

25. *Id.*

26. 339 Mich. 357, 63 N.W.2d 638 (1954).

27. The Michigan Hospital Service apparently did not qualify as an "insurance company" under local law at that time, although it was clearly in the role of an insurer. *See* 339 Mich. 357, 361, 63 N.W.2d 638, 640 (1954). *Contrast* Michigan Medical Serv. v. Sharpe, 339 Mich. 574, 64 N.W.2d 713 (1954) (in which subrogation was allowed when there was an express clause in the policy claiming this right).

28. *See* G. COUCH, *supra* note 10, § 61:3 and cases cited therein; J. APPLEMAN, *supra* note 13, § 6503 and cases cited therein.

interpreted thus when litigated.[29] The wording of subrogation provisions varies significantly, as one sees by examining two typical subrogation provisions contained in automobile insurance policies. When the applicable language provides that "[i]n the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization . . . ,"[30] the wording itself will not unduly encumber subrogation. The insurer could exercise its right of subrogation to the fullest extent allowed by the law of the jurisdiction, including suit directly against the tortfeasor.[31]

Courts have split, however, in interpreting subrogation clauses that essentially provide that "[u]pon payment . . . the company shall be subrogated to the extent of such payment to the *proceeds of any settlement or judgment* that may result from the exercise of any rights of recovery which the injured person . . . may have against any person or organization . . . ."[32] The Oregon Supreme Court has held that this language only entitles the insurer to an interest in any money recovered in settlement after the funds become the property of the insured, and does not entitle the insurer to sue the tortfeasor directly.[33] A recent Alabama case,[34] in dicta, interpreted a similar clause and indicated that it accepted this limiting construction of the language, although it did not cite the Oregon decision. Nevertheless, in *Davenport v. State Farm Mutual Auto Insurance Co.*,[35] the Nevada Supreme Court allowed the insurer to sue the tortfeasor directly, given an identical subrogation clause. It is not clear, however, whether the majority in *Davenport* held that the language of the clause entitled the insurer to sue the tortfeasor, or that equity would recognize the existence of a right to proceed against the tortfeasor in spite of that language.[36]

29. *See, e.g.*, Harris v. Huval Baking Co., 265 So. 2d 783 (La. App. 1972). The court interpreted an alleged subrogation clause as, in effect, providing merely for reimbursement should the injured person receive a recovery from the tortfeasor. The clause by its terms did not provide for any direct action against the tortfeasor.

30. Smith v. Travelers Ins. Co., 50 Ohio St. 2d 43, 43, 362 N.E. 2d 264, 264-65 (1977) (quoting from Mrs. Smith's policy with Travelers). Examples of the same or substantially similar wording abound. *See, e.g.*, Rinehart v. Farm Bureau Mut. Ins. Co., 96 Idaho 115, 116, 524 P.2d 1343, 1344 (1974); Bradford v. American Mut. Liab. Ins. Co., 213 Pa. Super. Ct. 8, 11, 245 A.2d 478, 479 (1968).

31. Payment before suit would be required, however, even if not expressly provided for, before subrogation could apply. *See* note 13 and accompanying text *supra*.

32. State Farm Mut. Auto. Ins. Co. v. Pohl, 255 Or. 46, 48, 464 P.2d 321, 322 (1970) (emphasis added). A substantially similar provision appeared in a policy that was the subject of litigation as recently as 1976. Hart v. State Farm Mut. Auto. Ins. Co. 248 N.W.2d 881, 883 (S.D. 1976). Whether the specific language in the policy would allow the insurer to sue the tortfeasor directly was not at issue and was not discussed in the case.

33. State Farm Mut. Auto. Ins. Co. v. Pohl, 255 Or. 46, 464 P.2d 321 (1970). The court indicated its awareness of the contrary interpretation by the Supreme Court of Nevada.

34. Alabama Farm Bureau Mut. Cas. Ins. Co. v. Anderson, 48 Ala. App. 172, 263 So. 2d 149, *aff'd*, 263 So. 2d 155 (Ala. 1972).

35. 81 Nev. 361, 404 P.2d 10 (1965).

36. The majority emphasized that the tortfeasor had entered into a settlement with the injured person in knowing disregard of the subrogation claim of the insurer, and thus could not use that settlement as a bar to a subsequent suit by the insurer against the tortfeasor. Allowing the insurer to sue

The Oregon court's interpretation of the effect of this subrogation provision seems preferable. Although legal subrogation against the tortfeasor can arise independently of any contractual provision,[37] when there is a contract it ordinarily should control the nature and extent of the rights of the parties who are in privity to it.[38] Because the insurer drafted the contractual provisions to claim an interest only in the proceeds of a recovery, the insurer's own language should be read against it and enforced accordingly.

III. THE EFFECT OF SUBROGATION ON TWO VENERABLE RULES OF TORT LITIGATION

A. *The Common Law Prohibition Against Assigning a Cause of Action for Personal Injury*

Some recent cases have held that the subrogation of the automobile insurer to the insured's claim for relief for medical payments is void because it violates the common-law prohibition against assigning personal injury claims.[39] This prohibition of the common law is likely to be raised in argument whenever a jurisdiction determines the applicability of subrogation to personal injury torts as a matter of first impression.

Several reasons have traditionally been offered for the common-law rule. There was some concern that allowing such assignments would present a danger of champerty and maintenance,[40] and would allow a litigious person of wealth to harass the poor.[41] In addition, the test of assignability of claims at common law was whether the claim would survive the death of its original holder. The cause of action for a personal injury tort ended with the death of the person harmed and thus the claim could not be assigned.[42]

Recent cases that have held subrogation for medical payments void as violative of the common-law rule have not emphasized traditional ratio-

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the tortfeasor was necessarily based on the concept that there were indeed subrogation rights enforceable against the tortfeasor, arising either by contract or in equity, since otherwise there would exist nothing capable of being knowingly disregarded.

37. *See* notes 23-24 and accompanying text *supra.*

38. G. COUCH, *supra* note 10, § 61:3; J. APPLEMAN, *supra* note 13, § 6503 and cases cited therein.

39. *See, e.g.,* State Farm Fire and Cas. Co. v. Knapp, 107 Ariz. 184, 484 P.2d 180 (1971); Travelers Indem. Co. v. Chumbley, 394 S.W.2d 418 (Mo. App. 1965). For a statement of the common law rule, see A. CORBIN, CORBIN ON CONTRACTS § 857 (1952).

40. *See* Hospital Serv. Corp. v. Pennsylvania Ins. Co., 101 R.I. 708, 712, 227 A.2d 105, 109 (1967); Tyler v. Superior Court, 30 R.I. 107, 73 A. 467 (1909) (attorneys took assignment of their client's favorable judgment for an assault, battery, and false imprisonment in place of their fees).

41. *See* Annot., 40 A.L.R.2d 500, 508 (1955).

42. Cardington v. Administrator of Fredericks, 46 Ohio St. 442, 448, 21 N.E. 766, 768 (1889); Slauson v. Schwabacher Bros., 4 Wash. 783, 784, 31 P. 329, 330 (1892); Annot., 40 A.L.R.2d 500, 505 (1955). Many states, for example Ohio, have statutes that modify the common-law rule that causes of action for personal injury will not survive the death of the injured party. *See* OHIO REV. CODE ANN. § 2305.21 (Page 1974).

nales for the rule. Instead, these cases have focused upon the potential for multiple litigation and the complication of settlements that would result if subrogation were upheld.[43] At least one modern case has held such subrogation clauses void on the basis of statutory provisions that were interpreted to incorporate the common-law rule.[44]

The better reasoning accepted by many modern courts is that subrogation as it operates in current insurance practice is distinguishable from assignment. Some technical distinctions between the two were asserted in a recent Indiana case:

> [S]ubrogation secures contribution and indemnity, whereas assignment transfers the entire claim; the consideration in subrogation moves from subrogor to subrogee, whereas in an assignment the consideration flows from assignee to assignor; . . . assignment normally covers but a single claim, whereas subrogation may include a number of claims over a specific period of time; subrogation entails a substitution, whereas assignment is an outright transfer.[45]

On a broader policy level, it can be seen that with subrogation, unlike assignment, the danger is significantly lessened that a litigious meddler will take advantage of the doctrine in order to gamble on the misery of another. In subrogation theory the subrogated insurer, after being substituted to the insured's claim for relief, seeks merely to be recompensed for the amount he has already paid pursuant to the duty owed the insured under a contract of indemnity. A volunteer who has no duty to indemnify the injured person cannot claim the benefit of the doctrine,[46] and even a proper subrogee should not recover any more than the amount that the subrogee has actually expended in payment for the injury.

B. *The Effect of Subrogation on the Collateral Sources Rule*

The collateral sources rule allows the victim of a tortious injury to recover from both his insurer and the tortfeasor for the same harm, assuming the harm was within the coverage of the injured person's policy. There is a divergence of viewpoint regarding the fairness of the rule. Some see the rule as allowing inequitable double recoveries, others feel that it is justified as a means for ensuring adequate compensation to

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43. *See, e.g.*, State Farm Fire and Cas. Co. v. Knapp, 107 Ariz. 184, 484 P.2d 180 (1971); Travelers Indem. Co. v. Chumbley, 394 S.W.2d 418 (Mo. App. 1965).

44. Peller v. Liberty Mut. Fire Ins. Co., 220 Cal. App. 2d 610, 34 Cal. Rptr. 41 (1963).

45. Imel v. Travelers Indem. Co., 152 Ind. App. 75, 78-79, 281 N.E.2d 919, 921 (1972). Other cases that distinguish between subrogation and assignment include Hospital Serv. Corp. v. Pennsylvania Ins. Co., 101 R.I. 708, 713, 227 A.2d 105, 109 (1967); DeCespedes v. Prudence Mut. Cas. Co., 193 So. 2d 224 (Fla. Dist. Ct. App. 1966), *aff'd*, 202 So. 2d 561 (1967).

46. Old Colony Ins. Co. v. Kansas Pub. Serv. Co., 154 Kan. 643, 121 P.2d 193 (1942); J. APPLEMAN, *supra* note 13, § 6502 n.22; E. PATTERSON, *supra* note 7, at 149; W. VANCE, *supra* note 7, at 791.

injured parties who are not able to directly recover for all the costs and damages incurred incident to a tortious injury.[47]

To allow subrogation to tort claims diminishes the effect of the collateral sources rule. When the insurer is subrogated, the insurer and not the insured is the party entitled to recover for the subrogated item of damage. Subrogation thus prevents a double recovery by the insured, despite the collateral sources doctrine.[48]

The use of subrogation to prevent the collateral sources rule from providing the insured with a double recovery arguably results in the insurer receiving double compensation when it takes the premiums from the insured to accept the risk, and then recovers its payment from the wrongdoer when the risk comes home to rest. In response, it can be stated that when the insurer has made provisions for subrogation the amount of the premium reflects both the risk of negligent loss and potential offset of some expenses through subrogation recoveries.[49] This response is undercut, however, if the premium charged to cover the risk is the same with or without subrogation. In that case the insurer has received double compensation.

Some information concerning the effect of subrogation on insurance rates suggests that there is often not an equitable relationship between subrogation recoveries and the cost of insuring a risk.[50] When subrogation has only an insignificant effect on rates, the insurer can nevertheless argue that it has simply made a very good bargain and should receive the benefit. The persuasiveness of this latter argument is diminished if one considers insurance policies as contracts of adhesion; the insurer should not be able to enforce "very good bargains" at the expense of the insured, who by virtue of subrogation is precluded from receiving funds to which he would otherwise be entitled under the collateral sources rule.

IV. JOINDER OF THE INSURER IN LITIGATION

The defendant tortfeasor can seek joinder of the subrogated insurer when a lawsuit is filed by the injured party.[51] With the expansion of insurance subrogation into the area of personal injury torts, joinder

47. For an excellent discussion of the collateral sources rule, see 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 25.22 (1956).

48. Defeat of the collateral sources rule affects only the insured. From the tortfeasor's perspective, there is no material change. The same amount that he would have paid to the injured insured will, under subrogation, be redirected to the insurer.

49. R. HORN, SUBROGATION IN INSURANCE THEORY AND PRACTICE 25 (1964).

50. *See* text accompanying notes 68-73 *infra*. *See also* R. HORN, *supra* note 49, at 149 (rating bureaus may not be required to provide subrogation recovery data in support of rate filings); *id.* at 173 (many insurers refused to respond to a questionnaire concerning their subrogation practices). Thus there may be some difficulty in obtaining specific information concerning the effects of subrogation within a particular jurisdiction.

51. The defendant can, of course, also seek joinder of the injured party in a lawsuit filed by the subrogated insurer. Royal Indem. Co. v. City of Erie, 326 F. Supp. 571 (W.D. Pa. 1971).

becomes increasingly important because there is a greater likelihood that more than one subrogated insured will be involved. Following an automobile accident, for example, Travelers might be subrogated to the property damage claim, Blue Cross and Blue Shield subrogated to various portions of the claim for medical expenses, and the insured might possess a claim for pain and suffering and lost wages. A failure to join may subject the tortfeasor to separate suits by all these parties.[52]

To achieve joinder of a party, the courts of the forum state must be able to exercise jurisdiction over that party. Due process requires that, to be subject to the jurisdiction of courts within a state, a party "have certain minimum contacts with the state such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[53] Modern long-arm statutes typically include provisions subjecting any corporation that transacts business within the state or contracts to insure any person, property, or risk within the state to the jurisdiction of that state's courts.[54] A single insurance contract within a state has been held constitutionally sufficient to subject the insurer to the jurisdiction of that state's courts.[55]

Joining the insurer has several advantages to the defendant tortfeasor apart from avoiding subsequent separate suit by the insurer as subrogee. Especially in jurisdictions that require the subrogated insurer to pursue its claim in its own name as the real party in interest, counsel for the defendant tortfeasors frequently seek to join as many insurers as possible. As Dean Prosser has noted, "[t]he evidence given in personal injury cases usually consists of highly contradictory statements from the two sides, estimating such factors as time, speed, distance and visibility, offered months after the event by witnesses who were never very sure just what happened when they saw it . . . ."[56] In close cases, the prospect of having the insurance company as a plaintiff against the individual may well tip the balance in favor of the defendant in the jurors' minds, or at least lead them to view the case as being in equipoise. In cases in which the insured is covered by several policies with each insurer upon payment being subrogated by the terms of its policy, the alleged tortfeasor can, by joining all of the insurance companies, create a very definite impression of the tortfeasor David being pitted against the insurance Goliaths.

To avoid such possible juror bias, insurers in some jurisdictions have used a device known as a loan receipt to avoid the impact of real party in

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52. *See* Nationwide Ins. Co. v. Steigerwalt, 21 Ohio St. 2d 87, 255 N.E.2d 570 (1970); Hoosier Cas. Co. v. Davis, 172 Ohio St. 5, 173 N.E.2d 349 (1961).

53. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

54. *See, e.g.*, ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1955); OHIO REV. CODE ANN. § 2307.382 (Page Supp. 1977).

55. McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

56. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 84, at 558 (4th ed. 1971).

interest rules.[57] Insurers pay the insured as required by the policy, but call the disbursement a loan. The document that the insured signs upon receiving the money provides that the "loan" is to be repaid from the proceeds of the recovery that the insured receives from the tortfeasor.[58] The insurer then claims that the insured, not itself, is the real party in interest because the insurer has only lent money and has not made payment. Some courts have been willing to look behind the fiction of the loan receipt and require that the insurer sue in its own name as a subrogee when payment that it is clearly obligated to make under the terms of its policy is provided in the guise of a loan.[59]

The applicable joinder rules vary among jurisdictions. The following discussion of relevant Ohio law illustrates additional aspects of joinder in insurance litigation.

In *Nationwide Insurance Co. v. Steigerwalt*,[60] the Ohio Supreme Court allowed an automobile insurer subrogated to a property damage claim to sue the alleged tortfeasor even though the alleged tortfeasor had won an earlier action prosecuted by the injured insured. The court decided that the prohibition against splitting a cause of action and the doctrine of res judicata were primarily for the benefit of the defendant. By failing to seek joinder, the defendant had waived these defenses to multiple litigation.[61]

The *Steigerwalt* rule can result in harsh consequences for a defendant who does not join the insurer in the suit. The chance, however, of a defendant being surprised by a second suit prosecuted by a subrogated insurer is reduced by Ohio Rule of Civil Procedure 19(C). Under Rule 19(C), an injured insured who sues the tortfeasor has an affirmative obligation to name his subrogees in his pleading and state the reasons why they are not joined as part of his suit. The tortfeasor will thereby have actual notice of the outstanding claims when litigation occurs.

Ohio Rule of Civil Procedure 19(A) directs that a subrogee subject to service of process shall be joined as a party. If the subrogee has not been joined, "the court shall order that [it] be made a party upon timely assertion of the defense of failure to join a party. . . . If the defense is not timely asserted, waiver is applicable. . . ."[62] When plaintiff insured has violated Rule 19(C) by failing to disclose the names of the subrogees, it can

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57. *See, e.g.*, FED. R. CIV. P. 17; OHIO R. CIV. P. 17. These Rules provide that "[e]very action shall be prosecuted in the name of the real party in interest."

58. *See* R. KEETON, BASIC TEXT ON INSURANCE LAW 156-57 (1971); E. PATTERSON, *supra* note 7, at 149.

59. *See, e.g.*, City Stores Co. v. Lerner Shops, 410 F.2d 1010 (D.C. Cir. 1969); Cleveland Paint and Color Co. v. Bauer Mfg. Co., 155 Ohio St. 17, 97 N.E.2d 545 (1951). *Contra*, Crocker v. New England Power Co., 348 Mass. 159, 202 N.E.2d 793 (1969).

60. 21 Ohio St. 2d 87, 255 N.E.2d 570 (1970).

61. *Id.* at 87-88, 255 N.E.2d at 570 (1970).

62. OHIO R. CIV. P. 19(A).

plausibly be argued that defendant tortfeasor who has not timely[63] asserted the defense of failure to join a necessary party should not be held to have waived that defense. Waiver generally requires an express or implied voluntary relinquishment of a known right, and the failure to comply with Rule 19(C) prevents the defendant from knowing, during the pleading stage, of the subrogees that should be joined. The tortfeasor should therefore be able to raise the defense at a later time, for example, after discovery is complete, if Rule 19(C) is not complied with. The defendant should at least be provided an opportunity to inform himself of the subrogation claims by use of interrogatories or depositions during discovery before the defense of failure to join a necessary party is precluded.

Often, the responsibility for seeing that joinder occurs falls on the defendant, who by failing to fulfill that responsibility may leave himself open to multiple litigation. Nevertheless, if the subrogated insurer is an indispensable party and not merely a necessary one, the ultimate burden of not joining it as a party may fall upon the insured plaintiff, whose action may be dismissed if an indispensable party is not joined.[64] An insurer is an indispensable party only if its presence in the suit is so important that "in equity and good conscience" the litigation should not proceed without it.[65]

The indispensable party rule may seldom present a major problem to an injured insured. Indeed, it would seemingly be a rare case in which a court would deny redress to an injured insured simply because the subrogee is not joined. The Supreme Court of the United States, in *United States v. Aetna Casualty & Surety Co.*,[66] has declared that in federal practice insurers subrogated to only part of the claims that an insured has against a tortfeasor are only necessary, not indispensable, parties.[67] Insurers of personal injuries seldom cover completely such items as lost wages and pain and suffering, and thus are generally only subrogees to a portion of the tort claims. Because the applicable procedural rule in Ohio, Rule 19(B), is modeled after Federal Rule 19, *Aetna* can be viewed as persuasive, although not mandatory, authority.

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63. *Id.* *See* J. McCORMAC, OHIO CIVIL RULES PRACTICE 61 (1970). *See also* OHIO R. CIV. P. 12(B), which requires that plaintiff's failure to join a party under Rule 19 must be raised as a defense either by motion "before pleading if a further pleading is permitted," or "in the responsive pleading . . . if one is required." The defendant generally has 28 days after plaintiff's service of process before his answer is due. OHIO R. CIV. P. 12(A)(1).

64. OHIO R. CIV. P. 19(B) & 12(H). *See* J. McCORMAC, *supra* note 63, at 61.

65. OHIO R. CIV. P. 19(B). The Rule also lists some more specific criteria that are to be considered in determining whether the party is indispensable.

66. 338 U.S. 366 (1949).

67. *Id.* at 382. Although the older version of Federal Rule of Civil Procedure 19 was the basis of the Court's decision, the 1966 revision was not intended to change the principles of the Rule; thus, *Aetna* should continue to be valid. *See* Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 117 (1968); 1 J. MOORE, FEDERAL PRACTICE RULES PAMPHLET 516 (1975).

V. POLICY ISSUES

A. *Subrogation and Insurance Rates*

Attorneys, seeking to impress courts with the equities of the situation, will often discuss whether subrogation reduces insurance rates. Some courts have accepted in a conclusory manner the argument that subrogation will decrease insurance rates.[68] Other courts have been skeptical whether anticipated recoveries under subrogation provisions are translated into reductions in premiums.[69] Those who view skeptically the claims of savings to the insurance industry, with correlative reductions in rates, appear justified in their doubts. For automobile insurance and other areas in which both parties to an accident typically carry policies, subrogation may only allocate financial responsibility between insurers with no substantial savings to the industry as a whole.[70] What occurs is often tantamount to a transfer of funds between competing insurers.

This transfer, or its functional equivalent, can occur in at least three ways. First, the injured party's insurer can pay the expenses incurred by its insured incident to the accident and then be reimbursed by the tortfeasor's insurer.[71] Second, the injured party's insurer, after making payment under the policy provisions, can successfully sue its own insured for reimbursement when the innocent insured receives a second recovery from the tortfeasor and the tortfeasor's insurer.[72] The innocent insured is thus merely a conduit through which money flows from the tortfeasor's insurer to the innocent party's insurer. Last, the injured party's insurer may have its subrogation rights prejudiced by the injured party's settlement with the tortfeasor and the tortfeasor's insurer prior to payment being disbursed. The prejudicial settlement will create an effective defense to an action brought by the injured party to compel payment by his own insurer for the same expenses covered by the settlement with the tortfeasor.[73] While no direct transfer between insurers has occurred in the last transaction, the net effect can be viewed as equivalent to a transfer. The injured party's insurer is able to keep money it otherwise would have had to expend but for the settlement and payment by the tortfeasor's insurer.

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68. *See, e.g.*, Travelers Indem. Co. v. Vaccari, 245 N.W.2d 844, 847 (Minn. 1976).

69. *See, e.g.*, Travelers Indem. Co. v. Chumbley, 394 S.W.2d 418, 425 (Mo. App. 1965); DeCespedes v. Prudence Mut. Cas. Co., 193 So. 2d 224, 227-28 (Fla. Dist. Ct. App. 1966), *aff'd*, 202 So. 2d 561 (Fla. 1967).

70. Insurers in other nations sometimes have "knock for knock" arrangements by which it is agreed that subrogation claims will not be pursued when there is an insurance company on each side of a lawsuit. Antitrust laws impede adoption of such agreements within the United States. P. KEETON & R. KEETON, CASES AND MATERIALS ON THE LAW OF TORTS 320 (1971).

71. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Roark, 517 S.W.2d 737 (Ky. 1974).

72. *See, e.g.*, National Union Fire Ins. Co. v. Grimes, 218 Minn. 45, 153 N.W.2d 152 (1967); Collins v. Blue Cross of Va., 213 Va. 540, 193 S.E.2d 782 (1973); Travelers Indem. Co. v. Rader, 152 W. Va. 699, 166 S.E.2d 157 (1969).

73. *See, e.g.*, Smith v. Travelers Ins. Co., 50 Ohio St. 2d 43, 362 N.E.2d 264 (1977); Geertz v. State Farm Fire and Cas. Co., 253 Or. 307, 451 P.2d 860 (1969).

This transaction is analogous to direct reimbursement of the innocent party's insurer by the tortfeasor's insurer.

There is also considerable doubt whether subrogation provisions significantly determine the rates of individual insurers. The attorney should be aware that even when an insurer has substantial recoveries or a significant reduction in paid-out benefits because of subrogation, the benefit to the insurer is not necessarily translated equitably into lower premiums for the insurance customer. A study conducted in the early 1960's discovered that rating bureaus "do not . . . possess any information on the precise dollar magnitudes of third-party recoveries under subrogation,"[74] and that some major insurers did not record subrogation statistics by class of insurance.[75] While neither fact taken from the study is conclusive, each supports the view that there is not a fair relation between subrogation recoveries and the cost of insuring a risk.

Professor Patterson has, for example, referred to subrogation as providing a "windfall" to the insurer that does not significantly affect the cost paid by the insurance customer.[76] Other legal authorities have also indicated in more restrained language that subrogation often plays an insignificant role in computation of premium rates.[77] In brief, as Professor Young has noted, "[i]nsurance subrogation would have more friends than it does if it could be shown that recoveries enter into premium-rate calculations in an equitable way."[78]

B. *Priority in Reviewing the Recovery From the Tortfeasor*

After a judgment is rendered against the tortfeasor, the question can arise whether the subrogated insurer or the insured should have priority (that is, be paid first from the funds available from the tortfeasor).[79] Priority becomes critical if the tortfeasor has assets so limited that he is unable to pay the claims of both the insured and the subrogated insurer[80] or if payment is exacted from the tortfeasor over a long period of time through serial executions. It may be critically important to an injured

74. R. HORN, *supra* note 49, at 151.

75. *Id.* at 174.

76. E. PATTERSON, *supra* note 7, at 151-52.

77. *See* DeCespedes v. Prudence Mut. Cas. Co., 193 So. 2d 224, 228 (Fla. Dist. Ct. App. 1966), *aff'd*, 202 So. 2d 561 (Fla. 1967); Travelers Indem. Co. v. Chumbley, 394 S.W.2d 418, 425 (Mo. App. 1965). *See also* 2 F. HARPER & F. JAMES, *supra* note 47, § 25.23 (1956), W. YOUNG, THE LAW OF INSURANCE 342-43 (1971); Reed, *Insurance Subrogation in Personal Injury Actions: The Silent Explosion* 12 AM. BUS. L. J. 111, 120 (1975) ("Insurance companies, in most instances apparently, apply subrogation recoveries to increase stockholder dividends rather than to reduce premiums.")

78. W. YOUNG, *supra* note 77, at 342.

79. *See generally* J. APPLEMAN & J. APPLEMAN, *supra* note 9, § 4096.

80. *See, e.g.*, Ervin v. Garner, 25 Ohio St. 2d 231, 267 N.E.2d 769 (1971). It is possible that the insurer and insured could enter into an agreement whereby each receives a proportional share of the available recovery. The party entitled to be paid by receiving the first, and perhaps only, money available from the tortfeasor may, however, often be unwilling to enter such an agreement since it can reduce the size of his recovery.

insured to recover promptly; the recovery may be the major source of funds for the payment of accident-related expenses. To illustrate how the law on priority can develop within a jurisdiction, relevant Ohio Supreme Court cases will be reviewed.

Newcomb v. Cincinnati Insurance Co.[81] is an early Ohio case adopting the principle that the insured is entitled to be compensated for both his loss and for reasonable expenses incurred in seeking recovery before the insurer can claim proceeds from the tortfeasor. The insurer in *Newcomb* based its priority claim upon legal, not contractual, subrogation and thus this decision of the Ohio Supreme Court represents a clear policy choice in favor of the insured when there is no express term in the policy covering the matter.

The decision in *Newcomb* represents sound reasoning. Insurers draft subrogation provisions and are in a superior bargaining position. It is thus reasonable to put the burden on the insurer to provide expressly for its own priority if this right is desired and to allow the insured priority if the contract is silent on this subject. This priority, however, should only last until an amount equivalent to the loss not covered by insurance is paid. Once the insured has received both the insurance money and an amount equal to the loss not covered by the insurance, he has been adequately compensated for the damage and the remaining funds available from the tortfeasor should go directly to the subrogated insurer without first passing through the hands of the insured.

Perhaps the strongest policy reason for allowing the insurer to have priority in the absence of an express provision is the assertion that it will increase the amounts recovered by insurers and lead to lower rates. It seems somewhat doubtful, however, that a factor that the insurer has not thought to include in its contract is equitably considered in the calculation of its rates. Moreover, there is an equally valid counterbalancing policy concern for potential hardship to the injured insured who, if not given priority, must bear the entire brunt of the tortfeasor's lack of sufficient funds. An insurer can spread the burden over a pool of policyholders.

Parties, however, retain their general freedom to contract and the result in *Newcomb* can be altered by virtue of express contractual provisions. Thus, in *Peterson v. Ohio Farmers Insurance Co.*[82] the syllabus of the Ohio Supreme Court states:[83]

> Where the policy subrogation provision and the subrogation assignment to the insurer convey all right of recovery against any third-party wrongdoer to the extent of the payment by the insurer to the insured, an insurer, who has

81. 22 Ohio St. 382 (1872).

82. 175 Ohio St. 34, 191 N.E.2d 157 (1963).

83. In Ohio the syllabus statement is important since if there is a conflict between the opinion and the syllabus regarding a statement of law, the syllabus will control. State *ex rel.* Canada v. Phillips, 168 Ohio St. 191, 151 N.E.2d 722 (1958).

cooperated and assisted in recovery from the wrongdoer, is entitled to be indemnified first out of the proceeds of such recovery.[84]

Subsequently, in *Ervin v. Garner*,[85] a case involving a subrogation provision and after-loss agreement similar to that in *Peterson*, the Ohio Supreme Court allowed the insurer to have priority despite the lack of significant assistance by the insurer in the prosecution of the suit against the tortfeasor.[86]

The critical language of the insurance policies in *Peterson* and *Ervin* provided that in exchange for the insurance payment the insured would be required to convey "all right of recovery against any party for loss to the extent that payment therefor is made by this company."[87] A passage in *Peterson*, later quoted in *Ervin*, stated:

> The insured's conveyance of all right of recovery up to a certain limit, *viz.*, the extent of the insurer's payment in settlement of the insured's claim, can mean only that the assignee [subrogee] is the owner of all the insured's rights of recovery until he is paid. The assignee [subrogee] . . . must have priority in payment out of the funds recovered.[88]

The language of the quoted subrogation provision did not, in this writer's view, express the insurer's priority in a straightforward manner. Indeed, neither the word "priority" nor the phrase "the insurer is to be paid first" appears in the agreement. The conveyance of all claims to the extent of the amount paid by the insurer can be reasonably interpreted as merely an express allocation of the portion of the total claims that the insurer could properly control as subrogee after payment; the language need not affect priority at all. Because the insurer, as drafter of the contract, should have the subrogation provision construed against it, more explicit terms should be required to grant priority to the insurer. The following language may be appropriate: The insurer, to the extent of its payment to the insured for which it claims subrogation, is entitled to be paid before the insured from any recovery available from the tortfeasor.

VI. CONCLUSION

Because accident and health insurance is increasingly common and because accidents involving personal injury often precipitate lawsuits or threatened lawsuits, the attorney is likely to have occasion to consider the

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84. *Id.* at 34, 191 N.E.2d at 157.

85. 25 Ohio St. 2d 231, 267 N.E.2d 769 (1971).

86. *Id.* at 231, 267 N.E.2d at 769-70. In *Ervin* the extent of the insurer's cooperation apparently consisted of sending a letter that asked the insured's attorney to represent its interests also. The letter containing the request was not answered by the insured's attorney. *Peterson* was distinguished on the basis of this "cooperation."

87. Ervin v. Garner, 25 Ohio St. 2d 231, 238, 267 N.E.2d 769, 773 (1971); Peterson v. Ohio Farmers Ins. Co., 175 Ohio St. 34, 37, 191 N.E.2d 157, 159 (1963).

88. Ervin v. Garner, 25 Ohio St. 2d 231, 237, 267 N.E.2d 769, 773 (1971); Peterson v. Ohio Farmers Ins. Co., 175 Ohio St. 34, 37, 191 N.E.2d 157, 159 (1963).

effects of insurance subrogation on personal injury torts. A distinction can be drawn between subrogation and assignment and thus even states that maintain the common-law prohibition against assigning a cause of action for personal injury may enforce subrogation provisions.

When subrogation provisions are enforced, the collateral sources rule has its benefits diminished from the viewpoint of the injured insured since subrogation prevents double recoveries by the insured and thus reduces his ultimate net recovery. Also, the prevalence of insurance means that more than one insurer may be providing coverage for an individual. Thus, from the viewpoint of the defending tortfeasor, the attempt should be made to join as many insurers as possible in the lawsuit in order to avoid multiple litigation and for tactical advantage when the insurer must pursue its claim in its own name under the jurisdiction's real party in interest rule.

Finally, subrogation recoveries have not generally been shown to have an equitable relationship to premium rate calculations and there is a question whether the insurer or the insured should recover first from the proceeds provided by the tortfeasor. In the absence of an express and straightforward provision granting priority to the insurer, the insured should be the party who recovers first from the tortfeasor.

Donald J. Srail